No. 86-93

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CASSANDRA M. MENOKEN

PETITIONER,

V.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner herein replies to respondent's memorandum in opposition to her petition seeking review of the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in the above captioned matter. Respondent essentially argues, in its memorandum, that the

petition should be denied for the following reasons:

1. It is impossible to ascertain petitioner's retention rights in connection with the 1981 reduction in force.

2. Petitioner failed to prove that she was "entitled" to a promotion.

3. The case at bar is 'far removed' from Vitarelli v. Seaton, 359 U.S. 535 (1959).

Petitioner herein contends that:

1. Respondent's claims of "impossibility" have been rejected by the Merit Systems Protection Board (Board) and the Federal Circuit and they should likewise be rejected by this Court.

2. Petitioner's entitlement to a promotion is a spurious issue which was not raised by respondent until after the Board's decision in this matter.

3. There is no factual or legal justification for the Federal Circuit's failure to follow the holding in Vitarelli, supra.

A. Respondent's Failure To Properly Determine Petitioner's Retention Rights

In setting forth the "factual" foundation for its argument against granting this petition, respondent attempts to justify its failure to properly determine petitioner's retention standing in 1981 by stating that it was "prevented from reconstructing exact reduction in force priority registers for CSA employees" because of the inadequacy of the personnel records maintained at CSA. Resp. 2. Respondent neglects to point out, however, that its claim of impossibility was expressly rejected by both the Board and the Federal Circuit. The Federal Circuit, in a decision which preceded the one at issue here, wrote:

> In directing [the remand] procedure the Board rejected the department's contention that the retention rights of individual employees who had not been appointed to positions with the Office of Community Services could not be determined ...
>
> Although the petitioner's challenge the factual basis for [the Board's] findings, we conclude that they are supported by substantial evidence ...

Certain Former CSA Employees v. Department of Health and Human Services, 762, F.2d 978, 985 (1985); Pet. App. C31-C32. petitioner urges the Court not to be swayed by respondent's persistent claims that it was impossible to establish proper retention priorities -- particularly when the record reflects that, when given a second opportunity to do so at petitioner's hearing, respondent made no attempt whatsoever to rectify its error. The Federal Circuit's decision in the case at bar ex-

cuses respondent's conduct in this regard. Pet. App. A19-A20. For reasons that are not explained, the lower court in the instant case, departed radically from its decision in the prior related matter. That decision upheld the remand procedure as a mechanism for properly determining the retention rights of former CSA employees who were challenging their terminations. Id. at 985; Pet. App. C34. Petitioner contends that the Federal Circuit's opinion in the case at bar should be reviewed with particular scrutiny in view of its unusual and unexplained failure to follow the findings set forth in Certain Former CSA Employees. Id.

B. Petitioner's Entitlement to a Promotion

Respondent's memorandum urges the Court to accept the Federal Circuit's finding that petitioner's claim has no merit because she failed to establish that she was entitled to a promotion. Resp. 3. Herein lies another example of the lower court's changing of the rules in the middle of the game. The nature of petitioner's burden in the remand hearings, as described by the Board, and upheld by the Federal Circuit, was as follows:

> [To] assert that [she] was identified with a continuing function ... Identify a position or positions for which [she] was qualified that have been assigned to other employees with less retention standing or positions occupied by employees with no initial entitlement to transfer. (Emphasis added.)

Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984): Pet. App. D41. Having met all of the above elements through undisputed evidence presented at her hearing, petitioner is now told that she failed to meet her burden because she did not prove entitlement to a promotion. It is significant to note that, at petitioner's hearing, respondent never once asserted that her grade had anything to do with its failure to appoint her to an attorney position. Entitlement to a promotion became an issue, for the first time, when the Board in its decision, sua sponte, added an additional element to petitioner's burden. Thus, instead of petitioner's entitlement to a position being governed

by her qualifications, the Board shifted the entire focus and decided to ignore petitioner's qualifications **altogether.**

The Federal Circuit's discussion of petitioner's qualifications for the attorney positions in the Office of Community Services (OCS) is unintelligible. In essence, it appears to hold that petitioner misconstrued the term "qualifications". Pet. App. A12. However, it is not clear how she misconstrued it. Respondent's own witness established that all CSA attorneys were placed in the same competitive area. Trans. 44-45. Moreover, as previously discussed, petitioner's qualifications for an attorney position were undisputed. It is simply unclear what else the petitioner was required to establish in order to be found qualified for a position in OCS. It is fundamental-

ly unfair and improper for the Federal Circuit to participate in what can only be characterized as a "moving target" approach to this case. It should be noted that there is absolutely nothing in the record to even suggest that grade levels had anything at all to do with respondent's appointment of attorneys in OCS. The evidence indicates (and respondent's own witness virtually admitted) that the attorneys in OCS had been appointed to, and indeed were working in, OCS before position descriptions were even prepared. Trans 65. It is clear that the grade levels assigned to those positions were merely reflective of the grade levels already held by the individuals pre-selec-

ted to fill them. 1/ One of those positions was held by one John Meyers, an individual whose retention rights were clearly inferior to those of petitioner. Pet. 16-17. Neither the decision of the Federal Circuit in the case at bar, nor the respondent's memorandum, cites any authority to support the proposition that an employee's grade level can operate to vitiate rights established under 5 C.F.R. § 351.501 (a)(1) and 502. The one case cited in respondent's memorandum, Mello v. Department of Energy, 20 M.S.P.R. 45 (1984), is clearly inapplicable to the instant matter. The issue in Mello in-

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1/ This was a major issue of fact which was specifically raised by petitioner in the proceedings below. Nevertheless, the Federal Circuit's decision completely fails to address it.

volved an employee's "bumping" rights after he was released from his competitive level in the first round of competition in a reduction in force. Petitioner's claim has nothing to do with the issue of "bumping" rights. Certainly, this petitioner was not required to prove that she was entitled to "bump" John Meyers from his position in OCS because the record reflects that John Meyers should never have been appointed to a position in the first place. There is also nothing in the record to justify respondent's decision to "detail" individuals from other agencies to positions in OCS.

C. The Applicability of Vitarelli v. Seaton

With regard to respondent's contention regarding the applicability of Vitarelli v. Seaton, supra, petitioner respect-

fully defers to this Court the determination of whether the improper termination of hundreds of employees, as opposed to just one, renders this case "far removed" from the principles enunciated in Vitarelli. Even if that were a proper distinction for the Federal Circuit to make in the consolidated proceedings below, that rationale could not apply here, because, in the case at bar, the issue is the improper termination of one employee.

Respondent argues that "most of the former CSA employees would have lost their positions regardless of how the reduction in force was carried out." Resp. 5. This may well be true. However, this blanket assertion fails to carry respondent's burden of showing that this petitioner would not have survived a properly implemented reduction in force -- and it

certainly does not excuse its failure to even try to make such a showing when given the opportunity in petitioner's remand hearing.

For the foregoing reasons, petitioner again urges review of this matter.

Respectfully submitted,

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